NOT FOR PUBLICATION - FOR UPLAOD

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Mahogany Run Condominium Association, Inc.,	)	
Plaintiff,	)	
v.	)	**Civil No. 2003-51**
Certain Underwriters At Lloyds, London subscribing to Insurance Policy No. LLL30514,	)	
Defendants,	)	

ATTORNEYS:

Adam G. Christian, Esq.
St. Thomas, U.S.V.I.
for the plaintiff

Nathania M. Bates, Esq.
St. Thomas, U.S.V.I.
for the defendant

MEMORANDUM

Moore, J.

Both parties have filed motions for summary judgment in this matter. They dispute whether a provision in an insurance policy obligates the defendants to provide coverage for an action pending against the plaintiff in Territorial Court. Because I find that there is more than one reasonable interpretation of the policy language, I conclude that the provision is ambiguous and will construe it in favor of the insured plaintiff. Accordingly,

I will grant the plaintiff's motion for summary judgment.

I. FACTUAL BACKGROUND

Mahogany Run Condominium Association, Inc. is a not for profit Virgin Islands Corporation that operates and maintains the Mahogany Run Condominiums. On January 19, 2000, Mahogany Run purchased general liability insurance from "Certain Underwriters at Lloyds, London subscribing to Insurance Policy No. LLL30514".[1] The relevant portions of the insurance policy provide as follows:

> 1. Insuring Agreement.
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result.
>
> . . .
>
> b. This insurance applies to "bodily injury" or "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period.
>
> . . .

[1] Lloyds is a foreign corporation which is organized and exists pursuant to the laws of the United Kingdom with its principal place of business in London, England.

2. Exclusions.

This insurance does not apply to:

. . .

f. Pollution

(1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.

. . .

Pollutants mean any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acid, alkalis, chemicals and waste. . . .[2]

On August 23, 2001, Valerie Downing filed suit against Mahogany Run in Territorial Court, alleging that she was exposed to "thoro-seal" after drinking tap water and bathing in water

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[2] The policy defines certain of the terms in quotation marks as follows:

bodily injury: bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

property damage: a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

occurrence: an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

supplied from the cistern that serviced her Mahogany Run condominium unit. Downing claimed that her health significantly deteriorated as a result of her exposure to thoro-seal, and requested compensatory damages from Mahogany Run for her injuries.

Upon being served with the complaint, Mahogany Run tendered it to Lloyds' local agent, Theodore Tunick & Co., and demanded that Lloyds' defend Mahogany Run pursuant to the insurance policy. On September 5, 2001, Tunick transmitted the complaint and a copy of the insurance policy to Snide & Associates, a claims litigation management company acting on behalf of Lloyds. The following day, Snide retained a law firm to defend Mahogany Run in the Territorial Court action.

On October 29, 2001, Lloyds filed a civil action in this Court against Mahogany Run, seeking a declaratory judgment that it was not obligated to defend Mahogany Run. On December 3, 2001, Snide authored and mailed to Mahogany Run a letter informing Mahogany Run that Lloyds believed Downing's injuries fell within the insurance contract's pollution exclusion. (Joint Ex. 5.) Snide also advised that it was investigating the matter and would defend Mahogany Run against Downing's lawsuit under a reservation of rights and with the full understanding that such action would not constitute an admission of coverage. The

following day, Lloyds voluntarily dismissed the suit pending against Mahogany Run in this Court.

On October 2, 2002, Lloyds notified Mahagony Run that Downing's suit in Territorial Court was not covered by its policy and that it would be instructing the law firm to terminate its representation of Mahagony Run. Lloyds apparently provided the aforementioned instructions to the law firm that same day, thereby terminating its coverage.[3] On March 18, 2003, Mahogany Run sued Lloyds in this Court. Counts I and II of its complaint allege that Lloyds breached its contractual obligation to provide coverage to Mahogany Run for the Downing lawsuit and its duty to defend Mahogany Run against the Downing lawsuit. Count III alleges that Mahogany Run is entitled to declaratory judgment because Lloyds failed to provide coverage and defend Mahogany Run. Count IV alleges that Lloyds acted in bad faith.

After engaging in discovery, both sides have moved for summary judgment. Mahogany Run seeks summary judgment against Lloyds on the liability claims presented in Counts I and II, and on the declaratory judgment claim in Count III. Conversely, Lloyds urges that I find no coverage under the policy for the

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[3] The defendants state in their opposition brief that "coverage was terminated on October 2, 2002 based on the advice of Lloyds' counsel." Neither side specifies if or when the law firm ceased working on the Downing matter.

claims asserted in the Downing complaint. The relevant arguments presented by both parties are discussed below.

II. JURISDICTION AND STANDARD OF REVIEW

This Court has diversity jurisdiction pursuant to section 22(a) of the Revised Organic Act of 1954[4] and 28 U.S.C. § 1332. I must grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Sharpe v. West Indian Co.*, 118 F. Supp. 2d 646, 648 (D.V.I. 2000). The nonmoving party may not rest on mere allegations or denials, but must establish by specific facts that there is a genuine issue for trial from which a reasonable juror could find for the nonmovant. *See Saldana v. Kmart Corp.*, 42 V.I. 358, 360-61, 84 F. Supp. 2d 629, 631-32 (D.V.I.1999), *aff'd in part and rev'd in part*, 260 F.3d 228 (3d Cir. 2001). Only evidence admissible at trial shall be considered and the Court must draw all reasonable inferences therefrom in favor of the nonmovant.

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[4] The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2003), *reprinted in* V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2004) (preceding V.I. CODE ANN. tit. 1).

See id.

III. ANALYSIS

The central issue presented by the parties is whether the policy's pollution exclusion provision exempts Lloyds from providing coverage to Mahogany Run for its expenses in defending against the Downing lawsuit.[5] The parties have presented competing interpretations of the relevant exclusion provision. Mahogany Run argues that the pollution exclusion provision could reasonably be interpreted to exempt only environmental pollution and not the matters raised in Downing's complaint. Lloyds, in contrast, contends that the only reasonable interpretation of the pollution exclusion provision is that it excludes not just environmental pollution, but also the types of claims in the Downing complaint. Lloyds asserts that thoro-seal is an irritant and therefore falls under the provision's broad definition of pollutants that are now excluded from coverage.

While Lloyds presents a reasonable reading of the policy's pollution exclusion provision, it is not the *only* reasonable

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[5] Mahogany Run argues that I can decide this matter without reference to the pollution exclusion provision. It asserts that I should rule that the Downing suit falls squarely within part 1.a. of the policy because Downing has alleged "bodily injuries" in a "suit." I reject this approach. Reading only part of the insurance policy while ignoring the exclusion provisions would violate Virgin Islands law. *See* 22 V.I.C. § 846 ("Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to and made a part of the policy.").

interpretation. Instead, it is just as reasonable to read the provision as exempting only environmental pollution, as Mahogany Run argues. The provision uses terms commonly associated with environmental pollution, stating that coverage does not extend to bodily injury which would not have occurred but for the "discharge, dispersal, seepage, migration, release or escape of pollutants at any time." Such conflicting but reasonable interpretations demonstrate the policy's essential ambiguity. *See New Castle County v. National Union Fire Ins. Co. of Pittsburgh, PA*, 174 F.3d 338, 347-52 (3d Cir. 1999). Virgin Islands law, as expressed in the Restatement of Contracts, states that in choosing between the two reasonable interpretations of ta contract, I should rely on the interpretation "which operates against the party who supplies the words or from whom a writing otherwise proceeds." *See* Restatement (Second) of Contracts § 206.

Furthermore, in insurance disputes such as this one, "[i]f the insured proffers a reasonable interpretation of an ambiguous term, then that term controls and the insured is entitled to judgment as a matter of law so long as the undisputed facts fall within the purview of the meaning offered by the insured." *In re Tutu Water Wells Contamination Litigation*, 78 F. Supp 2d 456, 466 (D.V.I. 1999); *see also Buntin v. Continental Ins. Co.*, 583 F.2d

1201, 1207 (3d Cir. 1978) (where "there is more than one reasonable reading of a policy provision . . . that provision must be construed against the insurance company which has drafted it"). Here, there are no disputed material facts outside the interpretation of the pollution exclusion provision, and it is undisputed that Lloyds drafted the ambiguous language in question. Accordingly, I will interpret the pollution exclusion provision against Lloyds and hold that Mahogany Run is entitled to judgment as a matter of law on Counts I, II, and III of its complaint. An appropriate order follows.

ENTERED this 30th day of August, 2004.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

cc: Hon. G.W. Barnard
Mrs. Jackson
Adam G. Christian, Esq.
Nathania M. Bates, Esq.
Jeffrey Corey, Esq.

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for the plaintiff

Nathania M. Bates, Esq.
St. Thomas, U.S.V.I.
for the defendant

ORDER

Moore, J.

For the reasons expressed in the memorandum of even date, the plaintiff's motion for summary judgment is hereby **GRANTED**.

ENTERED this 30th day of August, 2004.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

cc: Hon. G.W. Barnard
Mrs. Jackson
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